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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

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AZ CORP COMMISSION
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IN THE MATTER OF QWEST CORPORATION'S
PETITION FOR ARBITRATION AND
APPROVAL OF AMENDMENT TO
INTERCONNECTION AGREEMENT WITH
ARIZONA DIALTONE, INC. PURSUANT TO
SECTION 252(b) OF THE COMMUNICATIONS
ACT OF 1934 AS AMENDED BY THE
TELECOMMUNICATIONS ACT OF 1996 AND
APPLICABLE STATUTES.

DOCKET NO. T-01051B-07-0693
T-03608A-07-0693

**STAFF'S COMMENTS ON QWEST'S
MOTION FOR AN ORDER AWARDING
QWEST'S REQUESTED RELIEF
REGARDING THE PROPOSED
TRO/TRRO AMENDMENT**

I. Introduction.

Qwest Corporation ("Qwest") filed a Petition for Arbitration under 47 U.S.C. Section 252(b) and Arizona Administrative Code ("A.A.C.") R14-2-1505 to resolve open issues relating to an Amendment to its Interconnection Agreement ("ICA") with Arizona Dialtone, Inc. ("AZDT") intended to implement the Federal Communications Commission's ("FCC") *Triennial Review Order* ("TRO")¹ *Triennial Review Remand Order* ("TRRO").² A joint procedural conference was held in this matter and a related Complaint matter³ filed by Qwest against AZDT. AZDT and Staff were ordered to respond to Qwest's Motion for Summary Judgment in the Complaint proceeding and Motion for an Order Awarding Qwest's Requested Relief Regarding the Proposed *TRO/TRRO* Amendment based upon the Statements and Admissions of Arizona Dialtone, Inc., and Denying Arbitration of Alleged Billing Disputes, in this proceeding. Following are Staff's comments on Qwest's requested relief in the arbitration proceeding. Simultaneously with the filing of these comments, Staff is also submitting comments on Qwest's Motion for Summary Judgment in the Complaint proceeding.

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbant Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 19020 (2003) ("*Triennial Review Order*").

² *In re Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 (2005).

³ *In the Matter of the Formal Complaint of Arizona Dialtone Inc. filed by Qwest Corporation to Enforce its Interconnection Agreement*, Docket No. T-01051B-07-0694.

1 Staff believes the issues raised by Qwest in its Petition for Arbitration are more appropriately
2 handled through the parties' change of law provision and the pending Complaint proceeding. Qwest
3 apparently availed itself of the arbitration provisions of Section 252 in an effort to get this matter
4 more quickly resolved because of the statutory timelines associated with arbitrations and because the
5 FCC had encouraged parties in its Orders to rely upon the Section 252 arbitration process if disputes
6 arose with implementation. But in this case, AZDT has raised additional non-*TRRO* related issues,
7 which are engendering delay. In Staff's opinion, the FCC Orders which encouraged parties to use the
8 Section 252 arbitration process if disputes arose with implementation of the *TRRO*, intended that the
9 process focus upon implementation of the *TRRO* only, and not on a lot of extraneous issues as well.
10 We are now far beyond the period of intended implementation of the *TRRO*. Qwest is entitled to
11 have its ICA with AZDT reflect current FCC rulings on network element availability and pricing.

12 Both proceedings commenced by Qwest contain virtually identical issues, so resolution of one
13 proceeding will necessarily resolve the other. Accordingly, Staff believes that the parties should
14 stipulate to dismissal of the Arbitration proceeding (at least the *TRRO* related phase), and resolve the
15 *TRRO* related issues in the pending Complaint proceeding. With the disputed back billing issues
16 resolved in the Complaint proceeding, AZDT apparently will sign the *TRRO* Amendment.

17 Staff also recommends that the Commission accept Qwest's suggestion that the "billing
18 dispute" issues raised by AZDT be separated from the *TRRO* Amendment issues for further
19 development if that is AZDT's desire so that the Commission can focus upon resolving the
20 differences between the parties regarding the *TRRO*, in the Complaint Docket.⁴ Staff also
21 recommends that AZDT be given a fixed amount of time to indicate if it desires to pursue its issues at
22 this time, and if so, to more clearly delineate the issues, and identify whether those issues are most
23 appropriately handled through a new complaint proceeding or the pending arbitration proceeding.

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⁴ Qwest's Motion for an Order, page 14.

1 **II. Discussion.**

2 **A. While Arizona Dialtone Did not Clearly Delineate any Substantive Issues Related**
3 **to the Amendment in its Response, the TRRO Amendment filed by Qwest with its**
4 **Petition for Arbitration Raises Two Issues Directly Related to the TRRO.**

5 **1. The back-billing issues associated with the TRRO's implementation should**
6 **be resolved in the Complaint Docket.**

7 The first issue raised by the TRRO Amendment filed by Qwest relates to back-billing.
8 Because this issue has to do with past billing issues, Staff continues to believe that it may be more
9 appropriate to address this issue in the related Complaint proceeding. Qwest has apparently included
10 it in its ICA Amendment to provide a basis for such charges because AZDT apparently has refused to
11 recognize any charges above and beyond those it was charged by Qwest during the period of impasse
12 between the two companies. Staff believes that Qwest should obtain resolution of this issue through
13 the Complaint proceeding.

14 Other than this issue and an issue related to the transition period discussed below, Staff is not
15 aware of any issues of substance related to the TRRO that AZDT has with the TRRO Amendment.
16 This is confirmed by AZDT's Response to Qwest's Petition for Arbitration filed on January 17, 2008
17 wherein AZDT stated that it has been willing to sign a TRRO Amendment as long as the amendment
18 addressed other issues, which AZDT identified as "ongoing billing disputes with Qwest which AZDT
19 has sought to resolve for several years without success." See AZDT Response at para. 5.

20 **2. The second TRRO related issue has to do with the appropriate transition**
21 **period for elements no longer required under Section 251.**

22 A review of the red-lined proposed Amendment submitted by Qwest with its Petition also
23 indicates some difference between the parties with respect to the transition period from UNE-P. In
24 the TRO, the FCC provided for a 12 month transition period which is what AZDT originally sought
25 from Qwest. Qwest's proposed Amendment provides for a 90 day transition period. Staff believes
26 the parties should be able to come to agreement on this issue but sees no reason why if they are
27 unable to come to agreement, the issue could not be addressed in the Complaint matter as well.

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1 **3. AZDT does not dispute the applicability of the change of law provisions**
2 **of its current ICA with Qwest.**

3 AZDT stated in its Response to Qwest's Petition that it "disputes that the 'change of law'
4 provisions of the ICA are 'unavailing' or inapplicable to this arbitration proceeding." AZDT
5 Response at para. 11. Staff agrees that the change of law provisions are applicable to implementation
6 of the FCC's *TRRO*.

7 The parties' ICA contains the following change of law provision which provides in relevant
8 part:

9 To the extent that the Existing Rules are changed, vacated, dismissed,
10 stayed or modified, then this Agreement and all contracts adopting all
11 of part of this Agreement shall be amended to reflect such modification
12 or change of the Existing Rules. Where the Parties fail to agree upon
13 such an amendment within sixty (60) days from the effective date of
14 the modification or change of the Existing Rules, it shall be resolved in
15 accordance with the Dispute Resolution provision of this Agreement.⁵

16 The Dispute Resolution provision provides for discussions between higher management of the
17 company. Failing that, the parties' agreement provides for private arbitration. However, the parties
18 always have the option to come to the Commission as well. In that AZDT identified no substantive
19 issues with the *TRRO* Amendment in its February 4, 2008 Response, and there appear to be only the
20 two *TRRO* related issues discussed above outstanding which could be addressed in the pending
21 Complaint proceeding, Qwest is entitled under the change of law provision to have its contract with
22 AZDT reflect the status of current FCC rulings and existing law.

23 **4. The FCC's *TRO* and *TRRO* contemplated timely implementation of**
24 **changes associated with its most recent impairment analysis.**

25 The FCC's *TRO* and *TRRO* contemplated timely implementation of the changes associated
26 with the FCC's most recent impairment analysis. The *TRRO* became effective on March 11, 2005.
27 The FCC emphasized the need for timely implementation of its *TRRO* in the following passage from
28 its Order:

 We find that delay in the implementation of the new rules we adopt in
this Order will have an adverse impact on investment and sustainable
competition in the telecommunications industry. Therefore, to ensure
that there is no undue delay in commencing the renegotiation of
interconnection provisions, the effective date of the rules we adopt in

⁵ See, Section 2.2 of the parties' ICA.

1 this order shall be deemed the notification for request date for contract
2 amendment negotiations under this default approach.⁶

3 The parties appeared to have delayed resolution pending the outcome of the District Court's
4 Order in *Qwest v. Arizona Corporation Commission*, 496 F.Supp.2d 1069 (D.Ariz. 2007). However,
5 that decision having been issued as Qwest noted, and if the two issues identified above are excised
6 from the proposed Amendment and addressed in the Complaint proceeding, AZDT would no longer
7 have any legitimate reason to delay signing an Amendment to reflect the current status of federal law
8 on interconnection and network elements. To use the *TRRO* change of law process as leverage to get
9 other non-*TRRO* related issues resolved is inappropriate in Staff's opinion.

10 Qwest states in its Motion that its Petition for Arbitration "asks the Commission to adopt and
11 approve the *TRO/TRRO* Amendment that is substantially and in all material respects the same
12 amendment that Qwest has entered into with every other CLEC in the State of Arizona." Qwest
13 Motion at p. 2. However, Staff would ask that Qwest in its Reply to Staff's Comments identify any
14 differences between the standard *TRRO* Amendment and the Amendment it has asked AZDT to sign.

15 **5. AZDT should be required to inform the Commission if and how it desires to**
16 **proceed with its issues.**

17 While AZDT identified other non-*TRRO* issues in its response through an attached letter to
18 Qwest dated April 21, 2006, those issues are not clearly delineated nor sufficiently explained so that
19 Staff can determine whether these issues are most appropriately resolved in a complaint proceeding
20 or an arbitration proceeding. Most of the issues appear to be related to old billing disputes between
21 the parties.

22 With respect to non-*TRRO* related issues, it is Staff's position that these issues should not
23 interfere with the change of law process's application to the *TRRO* outlined in the parties' ICA. With
24 the issues relating to back-billing and the transition period excised and resolved in the Complaint
25 proceeding, there is no reason for AZDT not to sign the proposed *TRRO* Amendment which gives
26 recognition to important changes of law at the federal level, especially if the Amendment is the same
27 as other carriers have signed in Arizona. Given the length of time that elapsed since the *TRRO*'s
28 effectiveness, not to do so could be construed as a failure to negotiate in good faith.⁷

⁶ *TRO* at para. 703.

1 Typically, in an arbitration, the parties may ask the Commission to resolve any open issues
2 which were part of the parties' negotiations. Here as discussed, AZDT raised certain "billing
3 dispute" issues in response to Qwest's Petition for Arbitration. It is Staff's understanding of current
4 case law that AZDT would be entitled to have its "billing issues" resolved as part of a normal
5 arbitration. As mentioned above, however, Staff does not believe that the FCC contemplated use of
6 the arbitration process with respect to *TRRO* related disputes to resolve unrelated extraneous non-
7 *TRRO* issues. However, since the FCC did not speak directly to this issue, Qwest in electing to use
8 the Section 252 arbitration process has opened itself up to that process and all that it entails. In
9 hindsight, Qwest probably should have relied upon the change of law provision of its contract and
10 simply utilized the complaint process to resolve the back billing and transition period issues.

11 However, because AZDT's non-*TRRO* issues were not clearly presented, and AZDT must
12 decide whether those issues are more appropriately resolved in a complaint proceeding or an
13 arbitration; Staff recommends that Qwest's suggestion to sever these issues be adopted by the ALJs.⁸
14 Staff further recommends that AZDT be given a fixed amount of time in which to notify the
15 Commission if it wants to pursue these issues through arbitration or through filing of a complaint
16 with the Commission.

17 The non-*TRRO* related issues identified in the April 21, 2006 letter need to be sorted out by
18 AZDT to determine whether they are more appropriately handled in a complaint proceeding or a
19 subsequent arbitration proceeding, or both. Certainly, AZDT has a right to have its issues heard
20 before the Commission, if that is its desire. But Staff believes that immediate resolution of the *TRRO*
21 related issues to recognize the changes in law arising from the FCC's latest Triennial Review
22 Proceeding and related Order dated March 11, 2005 is also desirable.

23 **III. Conclusion.**

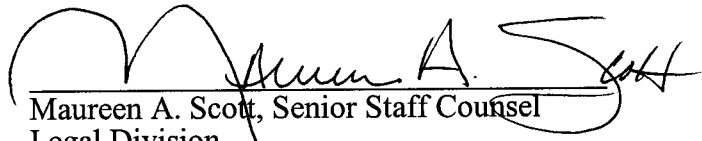
24 The outstanding *TRRO*-related matters should be resolved in the related Complaint
25 proceeding. Other issues not related to the *TRRO* should be resolved in a separate proceeding or
26 separate phase of this proceeding, if AZDT so desires and once AZDT delineates those issues in more
27

28 ⁷ See, *TRO* at para. 704.

⁸ See Qwest Motion at pps. 12-13.

1 detail and determines whether a complaint or arbitration proceeding is the most appropriate vehicle
2 for resolution of the matters.

3 RESPECTFULLY SUBMITTED this 22nd day of February, 2008.

4
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